Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

UBS PAINEWEBBER INC. AND RICHARD WILHELM,

Petitioners,

v.

ALFRED COHEN, EXECUTOR OF THE ESTATE OF SAMUEL GINSBURG,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR HAMILTON COUNTY, OHIO

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, contains a state common-law intentional-tort exception to the enforcement of arbitration clauses that cover "any and all" disputes between a broker-dealer and a client?

PARTIES TO THE PROCEEDING

Petitioners in this case are UBS PaineWebber Inc., a wholly-owned subsidiary of UBS AG, and Richard Wilhelm, an employee of UBS PaineWebber Inc. The respondent is Alfred Cohen, executor of the estate of Samuel Ginsburg.

With the exception of Richard Wilhelm, this case involves the same parties and the same underlying dispute as Case No. 01-1665, in which Alfred Cohen is the petitioner and UBS PaineWebber Inc. is the respondent.

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The decision of the Ohio Supreme Court denying review of the Hamilton County Court of Appeals' decision is unreported and is reproduced (Pet. App. 1a) in the appendix to this petition. The decision of the Hamilton County Court of Appeals is unreported and is reproduced (Pet. App. 4a-10a) in the appendix to this petition. The decision of the Hamilton County Court of Common Pleas is unreported and is reproduced (Pet. App. 11a) in the appendix to this petition.

JURISDICTION

The Ohio Supreme Court declined to review the Hamilton County Court of Appeals' decision on May 15, 2002. Pet. App. 1a. Jurisdiction in this Court exists under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

Section 2 of the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

INTRODUCTION

Despite the unyielding language of the Federal Arbitration Act (FAA), which makes "enforceable" in state or federal court any arbitration agreement "involving commerce," *id.*, this Court has frequently been asked to turn back state-law attempts to undermine the national enforceability of arbitration agreements. In *Perry v. Thomas*, 482 U.S. 483 (1987), the

Court held that a former Kidder, Peabody salesman could not invoke a California law that attempted to create a judicial forum for all wage disputes. The FAA, the Court concluded, preempted such state-law efforts to undermine the enforceability of a valid arbitration agreement between the salesman and his former employer. In *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996), the Court determined that the FAA preempted a Montana law that required all arbitration clauses to appear on the first page of a contract. And in *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265 (1995), the Court determined that the FAA preempted an Alabama law invalidating all pre-dispute arbitration agreements. In doing so, the Court rejected the contention that an arbitration contract could not be enforceable if the parties did not "contemplate" that their dispute would involve interstate commerce. 513 U.S. at 278-79. In each of these cases, the Court held that the Supremacy Clause prevented the States from enacting legislation that undercut the enforceability of valid arbitration contracts in particular and the FAA's national policy in favor of arbitration in general.

Today's case presents a variation on a theme. Rather than enact a state law that directly alters the FAA's broad presumption in favor of the enforceability of arbitration agreements, Ohio has tried indirectly to do the same thing through the common law of its courts. In this instance, the Ohio courts innovated an intentional-tort exception to a run-of-the-mill securities arbitration agreement that applies by its broad terms to "any and all controversies" between the parties.

To date, no federal court of appeals has adopted this gaping exception to the FAA, and numerous circuits and state courts have expressly rejected it. At the same time, however, the Alabama and Florida Supreme Courts (like the Ohio courts here) have developed an intentional-tort exception to the FAA that, like the decision here, utterly dilutes the federal policy in favor of arbitration. If this intentional-tort exception is allowed to take root in other States, none of which must follow

contrary federal court of appeals precedent, it is no exaggeration to conclude that the enforceability of arbitration provisions in collective bargaining agreements, accounts with member firms of the National Association of Securities Dealers, and all manner of other commercial settings will be severely disrupted. The enforceability of such agreements will turn not on Congress's national policy of encouraging arbitration but simply on the causes of action pleaded in the first-filed civil complaint. Review is needed to put this issue to rest before the gulf between state and federal court interpretations of arbitration agreements broadens any further.

STATEMENT

On August 11, 1992, Samuel Ginsburg entered into a "Client's Agreement" with UBS PaineWebber Inc. f/k/a PaineWebber, Incorporated ("PaineWebber"), under which Ginsburg agreed to arbitrate "any and all controversies" between him and PaineWebber. Among other things, the detailed arbitration provision states:

> I agree, and by carrying an account for me PaineWebber agrees, that any and all controversies which may arise between me and PaineWebber concerning any account, transaction, dispute or the construction, performance, or breach of this or any other agreement, whether entered into prior, on or subsequent to the date hereof, shall be determined by arbitration. Any arbitration under this agreement shall be held under and pursuant to and be governed by the Federal Arbitration Act . . . .

Pet. App. 5a-6a.

Ginsburg and PaineWebber subsequently executed a "Master Account Agreement" that contains a second arbitration agreement. This agreement mirrors the first one, except that it not only references disputes between Ginsburg and PaineWebber but also specifies that it governs disputes between Ginsburg and "[PaineWebber's] employees or

agents." Master Account Agreement, filed as Exhibit 1 to Defendants PaineWebber's and Richard Wilhelm's Memorandum in Opposition to Plaintiff's Motion for Temporary Restraining Order, *Cohen v. PaineWebber, Inc.*, No. A0004567 (Ohio Ct. Com. Pl. filed July 28, 2000). Like the first agreement, the second one specifies that, in the event of his death, Ginsburg's "personal representatives, heirs, estate, executors, administrators, committee and/or conservators, successors and assigns" are bound by the agreement. *Id.*

On October 9, 1999, Ginsburg died. *Id.* at 6a. Soon thereafter, Alfred Cohen was appointed to be the executor of Ginsburg's estate.

On July 26, 2000, Cohen (in his capacity as executor of the Ginsburg estate) filed this civil action in state court against PaineWebber and one of PaineWebber's managers, Richard Wilhelm. The action sought damages for alleged wrongdoing by a former broker of PaineWebber, Richard Zenni. In bringing the complaint, Cohen claimed that PaineWebber and Wilhelm committed two torts, unlawful conversion and fraudulent concealment, and sought compensatory and punitive damages. *Id.* Cohen did not name Mr. Zenni, the individual directly involved in the alleged torts, as a defendant. Rather, respondent's claims were premised entirely on a failure-to-supervise theory.

Because Cohen's action violated not just one, but two, arbitration agreements, PaineWebber sought to halt the state-court litigation. On July 28, 2000, just two days after the commencement of the state-court action, PaineWebber filed a diversity action in federal district court, seeking to compel Cohen to arbitrate his claims under the FAA. *Id.* At the same time, and again in accordance with the underlying arbitration agreements, PaineWebber filed a motion in state court seeking to stay the action there pending a ruling by the district court on PaineWebber's claim. Because the parties ultimately agreed

not to proceed with the state court action while the federal petition was pending, the state court did not rule on the motion and with one minor exception no further proceedings occurred in the state court until January 2001. At that time, the district court dismissed PaineWebber's action for failure to name an indispensable party, Richard Wilhelm, who (like Cohen) was a resident of Ohio. *Id.*

On January 12, 2001, PaineWebber moved the state court to compel Cohen to arbitrate his claims in accordance with the arbitration agreements. In opposition, Cohen conceded that the agreements existed, that they were valid, and that they were binding on the estate. He argued, however, that conversion and fraudulent concealment claims were exempt from arbitration and from the FAA as a matter of law. In a one-sentence analysis, the Hamilton County Court of Common Pleas agreed, stating merely that the motion to enforce the arbitration agreement was "not well taken" as a matter of law. Pet. App. 11a.

PaineWebber and Wilhelm appealed the trial court's decision. Relying on decisions from this Court confirming the FAA's strong national presumption in favor of arbitration, they argued that the trial court's decision would create a conspicuous exception to most arbitration agreements. "By overruling PaineWebber's and Wilhelm's motion to stay and declining to enforce the written arbitration agreements that Ginsburg signed," petitioners argued, "the trial court's decision below directly undermines the arbitration provisions of the FAA and . . . breeds the very type of litigation that such well-settled law seeks to avoid." Brief of Appellants PaineWebber Incorporated and Richard E. Wilhelm, at 8 (quotation omitted), *Cohen v. PaineWebber, Inc.*, No. C-010312 (Ohio Ct. App. filed July 26, 2001).

Nevertheless, on January 18, 2002, the Hamilton County Court of Appeals affirmed. Pet. App. 4a-10a. It acknowledged (by citation) the applicability of decisions

arising under the FAA, *see* Pet. App. 8a n.5 (citing *Marchese v. Shearson Hayden Stone, Inc.*, 734 F.2d 414, 423 (9th Cir. 1984)), and recognized that the arbitration agreement was "broad," Pet. App. 9a. But it nonetheless proceeded to ignore the federal policy in favor of arbitration and the numerous precedents from this Court respecting that policy. Instead, it determined that unlawful conversion and fraudulent concealment claims are not subject to arbitration as a matter of law:

> Although the arbitration provision is broad, stating that it covers "any and all controversies" pertaining to the brokerage account, we cannot say, as a matter of law, that a claim alleging such tortious conduct as the "aiding and abetting" of a theft is subject to the arbitration provision here. An arbitration clause itself is a contract. A contract requires a "meeting of the minds" as to the terms contained within. At the time the parties entered into the contract, there was no meeting of the minds that the arbitration provision would cover claims alleging tortious forms of theft. If the parties had contemplated, at the time they entered into the arbitration agreement, that PaineWebber would possibly steal from Ginsburg, that would surely be against public policy. . . . Accordingly, under the stated circumstances in this case, we hold that, as a matter of law, the claims of unlawful conversion and fraudulent concealment, were not subject to the arbitration provision.

Pet. App. 9a. In the view of the appellate court, in other words, the enforceability of an arbitration agreement turned not on federal "public policy" favoring arbitration but instead on an Ohio "public policy" disallowing the arbitration of intentional torts.

Petitioners sought discretionary review in the Ohio Supreme Court. In doing so, they explained that the court of appeals' decision would create a gaping hole in the FAA, was inconsistent with numerous precedents from this Court, and in

the end would dramatically undermine the national policy in favor of enforcing arbitration agreements. On May 15, 2002, however, the Ohio Supreme Court refused to hear the appeal. Pet. App. 1a.

REASONS FOR GRANTING THE WRIT

This petition satisfies each of the traditional hallmarks for obtaining review. There is a division of lower-court authority between those courts that have innovated an intentional-tort exception to the FAA and those courts that have held the FAA's policy in favor of arbitration preempts such innovations. The Ohio courts erred in ruling that the FAA's policy in favor of arbitration may be trumped by a State's common law "public policy" against the arbitration of intentional torts. And the issue is one of surpassing importance because the theory of the Ohio courts—that an arbitration clause covering "any and all controversies" between the parties does not extend to intentional torts—knows no boundaries, is endlessly manipulable, and in the final analysis will severely upset Congress's broad national mandate in favor of arbitration. The Court should grant review or at a minimum summarily reverse the decision below.

I. A Division Of Authority Exists On The Question Presented.

The conflict of authority implicated by the question presented is primarily between the federal courts of appeal on the one hand and several state courts on the other. On one side of the ledger, numerous federal courts of appeals have held that when two parties have entered into an arbitration agreement covering "any" or "all" or "any and all" controversies between them, those words carry their customary meaning and encompass all causes of action, including intentional torts. On the other side of the ledger, a handful of state courts have limited the enforceability of

similar arbitration clauses to contract-based causes of action and specifically refused to extend them to intentional torts.

The position favoring the arbitration of intentional-tort claims has considerable company. One federal appellate court after another has held that when two parties agree to arbitrate "any" or "all" disputes between them, the agreement covers intentional torts ranging from fraud and conspiracy, *see Long v. Silver*, 248 F.3d 309 (4th Cir.), *cert. denied,* 122 S. Ct. 213 (2001), to defamation, *see Coudert v. Paine Webber Jackson & Curtis*, 705 F.2d 78, 81-82 (2d Cir. 1983), to intentional infliction of emotional distress, *see Aspero v. Shearson American Express, Inc.*, 768 F.2d 106, 107 (6th Cir. 1985) (quotation omitted) (holding that arbitration agreement encompassing "[a]ny controversy . . . arising out of employment or termination of employment" included former broker's claims for defamation, invasion of privacy, and intentional infliction of emotional distress), *cert. denied,* 474 U.S. 1026 (1985).

Typical of these cases is *Gregory v. Electro-Mechanical Corp.*, 83 F.3d 382 (11th Cir. 1996). There, disgruntled purchasers of stock in a closely-held corporation brought seven claims against the sellers with whom they had a written contract that included an arbitration agreement. At the trial level, the district court held that the plaintiffs' seven claims, including counts for "fraud, fraudulent inducement, deceit, misrepresentation, conversion, breach of good faith and fair dealing, and outrage," fell outside the parties' agreement to arbitrate all disputes "arising under" the stock purchase agreement. *Id.* at 384. Not so, the Eleventh Circuit held. Where the underlying contract formed the foundation of the parties' relationship, and the claims arose from one side's "failure to fulfill its perceived obligations," the parties' disputes are fully arbitrable no matter how denoted. *Id.*

The Seventh Circuit has taken a similar position. "[A] party may not avoid a contractual arbitration clause," it has

concluded, "merely by casting its complaint in tort." *Sweet Dreams Unlimited, Inc. v. Dial-A-Mattress Int'l, Ltd.*, 1 F.3d 639, 643 (7th Cir. 1993) (quotation omitted). Indeed, the arbitrability of intentional tort claims has become, at least for the federal courts of appeal, relatively routine. *See, e.g., Kerr-McGee Ref. Corp. v. M/T Triumph*, 924 F.2d 467, 468, 469 (2d Cir. 1991) (affirming award of treble damages for RICO and civil conversion claims under arbitration agreement applicable to "any and all . . . disputes of whatever nature arising out of" the parties' contract); *Wood v. Prudential Ins. Co. of America*, 207 F.3d 674, 681 (3d Cir. 2000) (common law defamation and intentional infliction of emotional distress claims within scope of NASD arbitration clause); *Am. Recovery Corp. v. Computerized Thermal Imagery, Inc.*, 96 F.3d 88, 90 (4th Cir. 1996) (quotation omitted) (breach of fiduciary duty, tortious interference, quantum meruit claims arbitrable under clause concerning "[a]ny dispute, controversy, or claim arising out of or related to" contract); *Pers. Sec. & Safety Sys., Inc. v. Motorola, Inc.*, No. 01-11040, 2002 WL 1413702, at *4 (5th Cir. 2002) (holding common law fraud claim arbitrable under agreement covering "matters . . . arising out of or relating to this [a]greement"); *Harter v. Iowa Grain Co.*, 220 F.3d 544, 549 (7th Cir. 2000) (holding federal RICO, state RICO, Commodities Act, common law fraud, breach of fiduciary duty, intentional infliction of emotional distress claims all arbitrable under contract calling for arbitration of "any disputes or controversies arising out of" hedge-to-arrive commodities contracts); *Barker v. Golf U.S.A., Inc.*, 154 F.3d 788, 793 (8th Cir. 1998) (holding fraud claim arbitrable); *Marchese v. Shearson Hayden Stone, Inc.*, 734 F.2d 414, 419 (9th Cir. 1984) (holding common law breach of fiduciary duty claim arbitrable under arbitration clause applicable to "[a]ny controversy arising out of or relating to my account") (quotation omitted); *Brown v. Coleman Co.*, 220 F.3d 1180, 1184 (10th Cir. 2000) (holding defamation claim and equitable remedies within scope of "all disputes or controversies arising under or in connection with" contract) (quotation omitted),

cert. denied 531 U.S. 1192 (2001); *LaPrade v. Kidder, Peabody & Co.*, 246 F.3d 702, 705 (D.C. Cir. 2001) (affirming confirmation of award in case where arbitration had been compelled for federal and state employment discrimination claims, federal and state equal pay claims, and common law defamation and fraud claims).

Some state supreme courts have taken a similar view. *See, e.g., Rossi Fine Jewelers, Inc. v. Gunderson*, No. 2002 SD 82, 2002 WL 1483225 (S.D. July 10, 2002) (applying FAA to hold that arbitration clause in franchise agreement was broad enough to include common law claims for breach of covenant of implied duty of good faith and fair dealing, actual fraud, constructive fraud, deceit and misrepresentation); *Weitz v. Hudson*, 546 S.E.2d 732 (Va. 2001) (holding that claims for conversion of partnership assets were subject to arbitration under partnership agreement); *Hirschfeld Prods. v. Mirvish*, 673 N.E.2d 1232, 1233 (N.Y. 1996) (holding that arbitration clause encompassed claims for common law tortious interference and breach of fiduciary duty).

While the contrary position adopted by the Ohio courts represents a distinct minority view, it is not without company. In *Ex parte Discount Foods Inc.*, 711 So. 2d 992 (Ala.), *cert. denied sub nom. Supervalu Inc. v. Discount Foods, Inc.*, 525 U.S. 825 (1998), *reconsidered in part* 789 So. 2d 842 (2001), the Alabama Supreme Court considered an arbitration agreement obligating a grocery store and its suppliers to arbitrate "[a]ny controversy or claim arising between the parties, including, but not limited to, disputes relating to this [a]greement." *Id.* at 993 (quotation omitted). In the court's view, the clause did not govern the grocer's claims for tortious interference with contract, unfair competition and violation of trade secret laws. "To hold otherwise," the Alabama Supreme Court concluded, "would allow persons signing broad arbitration provisions to commit intentional torts against one another, which torts are outside the scope of their contemplated dealings, without concern that they might have

to answer for their actions before a jury of their peers." *Id.* at 994.

The Florida Supreme Court has followed a similar path. In *Seifert v. U.S. Home Corp.*, 750 So. 2d 633 (Fla. 1999), the court considered a wrongful death claim brought by a home purchaser against a builder who installed an allegedly faulty air conditioner. That court, like the Alabama and Ohio courts, held that the claim was not subject to arbitration because wrongful death was "predicated upon a tort theory of common law negligence unrelated to the rights and obligations of the contract." *Id.* at 640. Before reaching this conclusion, the Florida Supreme Court—without citing the FAA—acknowledged that this Court has held that "claims for fraud, misrepresentation, breach of contract, breach of fiduciary duty, and violation of state franchise investment law" all fall within the contractual promise to arbitrate "[a]ny controversy or claims arising out of or relating to" a contract. *Id.* at 637, (*citing Southland Corp. v. Keating*, 465 U.S. 1, 15 n.7 (1984)). But rather than follow that guidance, the Florida Supreme Court turned instead to an Arizona lower court decision. *See Seifert*, 750 So. 2d 639-641 (discussing *Dusold v. Porta-John Corp.*, 807 P.2d 526 (Ariz. Ct. App. 1990)). "'If . . . the duty alleged to be breached is one imposed by law in recognition of public policy,'" the Florida Supreme Court quoted, a claim brought for violation of that duty "sounds in tort" and is not subject to arbitration. *Seifert*, 750 So. 2d at 639 (emphasis omitted) (quoting *Dusold*, 807 P.2d at 531).

In the face of this mature and increasingly deep division of authority, review is appropriate. As the case reporters confirm, not only have several state courts charted a different course on this issue from the uniform holdings of the federal courts of appeal, but many of those decisions conflict with respect to the same state jurisdiction. The writ should be granted (1) to establish uniform commercial expectations regarding the enforceability and scope of traditional arbitration clauses and (2) to ensure that Congress's national policy in

favor of arbitration is not diluted by inconsistent state court decisions.

II. The Ohio Courts Erred In Creating An Intentional-Tort Exception To The FAA Under That State's Common Law "Public Policy."

Besides implicating a deep division of lower-court authority, the lower courts erred in resolving the question presented. No precedent of this Court supports the creation of such an imposing state exception to the FAA's national policy in favor of arbitration, and many of the Court's precedents specifically contradict such state authority. For this reason alone, the petition should be granted.

At this late date, there can be little doubt that federal law affirmatively "compels judicial enforcement of a wide range" of arbitration agreements. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 111 (2001). And this "strong federal policy in favor of enforcing arbitration agreements," *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217 (1985), not only compels courts "rigorously [to] enforce agreements to arbitrate," *id.* at 221, but also creates a strong presumption in favor of arbitration. As the Court has explained:

> The [FAA] establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay or a like defense to arbitration.

Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983). If two parties choose voluntarily to sign an arbitration agreement covering their disputes, in other words, the National Legislature has left the courts with "no place for the exercise of discretion" in enforcing the terms of that agreement. *Dean Witter*, 470 U.S. at 218.

Neither has the Court left open the question whether non-contractual theories of relief must be arbitrated: They

assuredly must be. The Court has consistently concluded that arbitration agreements of comparable breadth cover disputes as diverse as age discrimination, *see Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), violations of the Securities Act of 1933, *see Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989), actions under the Securities Exchange Act of 1934, *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987), anti-fraud actions under RICO, *id.*, and antitrust violations under the Sherman Act, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

The Court also has not hesitated to strike state statutes that conflict with the FAA's pro-arbitration mandate. *Perry v. Thomas*, 482 U.S. 483 (1987), for example, held that a former Kidder, Peabody salesman could not rely upon a California law that attempted to create a judicial forum for all wage disputes. In the Court's view, the FAA preempted such state-law efforts to undermine the enforceability of a valid arbitration agreement between the salesman and his former employer. In *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996), the Court determined that the FAA preempted a Montana law that required all arbitration clauses to appear on the first page of a contract. And in *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265 (1995), the Court determined that the FAA preempted an Alabama law invalidating all pre-dispute arbitration agreements. In doing so, the Court rejected the same "meeting of the minds" school of thought embraced by the Ohio courts here—that an arbitration contract could not be enforceable if the parties did not "contemplate" that their dispute would involve interstate commerce. *See* 513 U.S. at 278-79. Confirming the consistency of this line of decisions, the Court recently rejected a state-law argument that an individual's right to judicial review survived a parties' arbitration agreement to the contrary. *Circuit City*, 532 U.S. at 121-22. One cannot respect the Ohio courts' "public policy" exception to the FAA

without slighting this Court's uniform body of precedent to the contrary.

Not only do the Court's decisions fail to suggest that the enforceability of an arbitration agreement stops at the threshold of a common-law intentional tort, but every relevant decision in the last two decades points directly in the opposite direction. In the first and final analysis, the federal policy in favor of arbitration requires the parties' agreement to be "generously construed" in favor of private resolution. *Mitsubishi Motors*, 473 U.S. at 626. The Ohio courts' failure to hew to this well-traveled path supports the writ or in the alternative requires a summary reversal.

III. The Question Presented Is Important And Recurring In Nature.

The subject matter of this dispute—the enforceability of arbitration clauses—also supports the writ. The sheer number of alternative-dispute cases, as an initial matter, makes arbitration-related issues of this magnitude uniquely essential to resolve. By definition, such disputes affect large numbers of people and large amounts of money. And by definition, any ambiguity about the scope of federal preemption of state law arbitration exceptions leads to litigation that it is the essential purpose of the FAA to circumscribe.

Nor may these concerns lightly be dismissed. Arbitration remains the primary device for resolving disputes arising from securities transactions, securities-industry employment, collective bargaining agreements and international commercial transactions. *See, e.g.*, NASD Code of Arbitration Rule 10101; 9 U.S.C. § 301. It also continues to be a pivotal device for resolving controversies between domestic commercial enterprises, between landlords and contractors, and between many non-unionized employees and their employers. If left to stand or, worse, if embraced by other courts, the decision in this case will spawn protracted litigation over the question of arbitrability itself—a particularly pointless exercise given the

clarity of traditional arbitration clauses of this type—and may well jeopardize this method of dispute resolution in many settings.

The growing tension between federal and state courts over the existence of an intentional-tort exception to the FAA, moreover, only compounds these problems. In this case, as in many others like it, the parties have pursued parallel proceedings in state and federal court—with the plaintiff racing to state court to obtain an intentional tort judgment and with the defendant racing to federal court to enforce the arbitration agreement signed by the parties. This takes an already-inefficient situation—apparent uncertainty over the FAA's application to intentional torts—and doubles the inefficiency by clogging two dockets with expedited proceedings designed to get a single result regarding a single dispute. *See, e.g., Cohen v. PaineWebber, Inc.*, 6th Cir. Case No. 01-3228, *petition for cert. filed*, No. 01-1665. Conceived as a device to avoid litigation, arbitration clauses in these situations have become handmaidens of "prolonged litigation, one of the very risks the parties, by contracting for arbitration, sought to eliminate." *Southland Corp. v. Keating*, 465 U.S. 1, 7 (1984). Surely this is not alternative dispute resolution at its best, and it assuredly is not the national arbitration policy that Congress set in motion by enacting the FAA.

As this dispute well illustrates, the conflict in the lower courts over these issues also has generated uncertainty even for residents of the same State. Residents of Florida and Alabama must grapple with disparate precedents from the Eleventh Circuit on the one hand and the Florida and Alabama Supreme Courts on the other regarding the arbitrability of an intentional-tort claim. And the same is now true for litigants in Ohio in view of the lower-court decisions in this case and the existing Sixth Circuit authority rejecting the claim that an intentional-tort exception to the FAA exists. Because no one litigant and the residents of no one State should have to face

such unpredictable consequences stemming from the same dispute, this factor by itself supports the writ.

If the Ohio decision stands, moreover, the enforceability of an arbitration agreement also would turn, anomalously, on the creativity of the party's lawyer. By simply crafting the dispute as one sounding in tort or intentional tort, a litigant could remove the claim from the once-ample realm of traditional arbitration agreements. Worse, the artificial distinction between claims that are pleaded as intentional torts and those that are not will lead to claim-splitting, with some causes decided by arbitration while other issues in the very same case—and likely involving the very same facts—being decided in the court system by a jury.

One final point deserves mention. As noted above, the Court has issued several decisions in the last fifteen years making it clear that the FAA preempts state *statutes* that undermine the National Government's policy in favor of arbitration. What it has not done and what presumably led to the confusion that generated these lower-court decisions is clarify that the FAA equally preempts state *common-law* doctrines that come to the same thing—namely, undermine or conflict with Congress's effort to protect the enforceability of traditional arbitration clauses. The Court faced a similar dilemma ten years ago in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992). There the question was whether the federal statute preempted state common-law, as opposed to state statutory, claims. For many of the same reasons that the Court concluded that the *Cipollone* statute preempted state statutory *and* state common-law claims, it should reach a similar conclusion here.

In the last analysis, this petition squarely raises a compelling federal question arising from the latest state attempt to excuse litigants from the deeply-embedded federal policy in favor of arbitration. The case should be reviewed on the merits or at a minimum it should be summarily reversed.

CONCLUSION

The petition for a writ of certiorari should be granted, or at a minimum the decision below should be summarily reversed.

Respectfully submitted,

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August 2002

APPENDIX

[Filed 5/15/02]

The Supreme Court of Ohio

Alfred Cohen, Executor of the Estate of Samuel Ginsburg, Appellee,	:	Case No. 02-375
v.	:	
[UBS] PaineWebber, Inc., and Richard Wilhelm, Appellants.	:	ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

COSTS:

Docket Fee, $40.00, paid by Jones, Day, Reavis & Pogue.

(Hamilton County Court of Appeals; No. C010312)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

ALFRED COHEN	APPEAL NO. C-010312
Appellee,	
	ENTRY OVERRULING MOTION TO CERTIFY AND OVERRULING MOTION TO CONTINUE STAY
PAINEWEBBER INCORPORATED, et al.	
Appellants,	

This cause came on to be considered upon the motion of the appellants filed herein to certify the Ohio Supreme as a conflict and the motion of the appellants to continue the stay pending an appeal to the Ohio Supreme Court and upon the responses thereto, and

The Court, upon consideration thereof, finds that the motions are not well taken and are overruled.

To The Clerk:

Enter upon the Journal of the Court on 2/22/02 per order of the Court.

By: /s/ Gorman, J.
Acting Presiding Judge

Case No. C-010312

ALFRED COHEN EXEVUTOR [sic] OF
EST OF SAMUAL [sic] GINSBURG
- vs -
PAINEWEBBER INCORPORATED

HAMILTON COUNTY CLERK OF COURTS
230 EAST NINTH ST ROOM 12100
CINCINNATI OH 45202

IN ACCORDANCE WITH APPELLATE RULE 30(A), YOU ARE HEREBY GIVEN NOTICE THAT THE FOLLOWING ORDER OR JUDGMENT HAS BEEN JOURNALIZED ON THE 18TH OF JANUARY, 2002, IMAGE NUMBER 93.

JUDGMENT ENTRY AFFIRMING JUDGMENT OF TRIAL COURT (A-0004567). NOTICE IS SENT BY ORDINARY MAIL TO ALL PARTIES REQUIRED BY LAW.

Deputy: SHERRY SIBERT
JAMES CISSELL - Clerk of Courts

[Presented to the Clerk of Courts for Filing 1/18/02]

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

ALFRED COHEN, Executor of the Estate of Samuel Ginsburg,	:	APPEAL NO. C-010312 TRIAL NO. A-0004567
Plaintiff-Appellee,	:	*DECISION.*
vs.	:	
PAINEWEBBER, INC.,	:	
and	:	
RICHARD WILHELM,	:	
Defendants-Appellants.	:	

Civil Appeal From: Hamilton County Court of Common Pleas
Judgment Appealed From Is: Affirmed
Date of Judgment Entry on Appeal: January 18, 2002

Waite, Schneider, Bayless & Chesley Co., L.P.A., Stanley M. Chesley, Terrence L. Goodman, Barrett & Weber, L.P.A., and *Michael R. Barrett*, for Plaintiff-Appellee,

Jones, Day, Reavis & Pogue, Jeffrey J. Jones, and *Douglas M. Mansfield*, for Defendants-Appellants.

Please Note: We have *sua sponte* removed this case from the accelerated calendar.
Per Curiam.

Defendants-appellants PaineWebber, Inc., and Richard Wilhelm appeal the trial court's order denying their motion to stay proceedings and their motion to compel arbitration pursuant to the agreement signed by plaintiff-appellee Alfred Cohen's deceased, Samuel Ginsburg, and PaineWebber. Upon our conclusion that the arbitration agreement did not cover claims that essentially alleged theft, we affirm the judgment of the trial court.

The record transmitted to this court demonstrates the following facts. PaineWebber is an investment firm based in Delaware with an office in downtown Cincinnati. Richard Wilhelm, at all times relevant to this dispute, was the manager of PaineWebber's Cincinnati office. Wilhelm's duties included supervising and monitoring all employees and accounts in the Cincinnati office. PaineWebber employed Richard Zenni as a registered securities broker for its Cincinnati office from 1992 to 1999. Zenni, through bankruptcy-court filings, has allegedly admitted to stealing millions of dollars from PaineWebber's elderly investors, which included Samuel Ginsburg.

Ginsburg opened a PaineWebber account with Zenni in August 1992, and, at that time, Ginsburg executed an account application and a client's agreement that included an arbitration clause. The arbitration agreement provided, in part, as follows:

> I agree, and by carrying an account for me PaineWebber agrees, that any and all controversies which may arise between me and PaineWebber concerning any account, transaction, dispute or the construction, performance, or breach of this or any other agreement, whether entered into prior, on or subsequent to the date hereof, shall be determined by arbitration. Any arbitration under this agreement shall be held under and pursuant to and be governed by the Federal Arbitration Act * * *.

There is not dispute that Ginsburg signed the agreement containing this arbitration provision, and that Ginsburg's heirs and executors are also bound by the agreement.

Ginsburg died on October 9, 1999. Shortly after his death, it was discovered that over one million dollars had been stolen from his PaineWebber account. On July 26, 2000, Alfred Cohen, in his capacity as the executor of Ginsburg's estate, filed a complaint in the Hamilton County Court of Common Pleas against PaineWebber and Wilhelm, alleging unlawful conversion and fraudulent concealment. Specifically, Cohen alleged that PaineWebber and Wilhelm had aided and abetted Zenni in stealing money from Ginsburg. On July 28, 2000, PaineWebber filed a petition in the United States District Court for the Southern District of Ohio, seeking to compel arbitration and to stay the civil action. Cohen contested the federal district court's jurisdiction to stay the civil proceedings and compel arbitration, arguing that Wilhelm was a necessary and indispensable party to the lawsuit, and that once Wilhelm was joined as a party, the district court's diversity jurisdiction would be defeated. The district court agreed and dismissed PaineWebber's petition. That decision is currently on appeal to the United States Court of Appeals for the Sixth Circuit.

In response to the complaint filed by Cohen in the Hamilton County Court of Common Pleas, PaineWebber and Wilhelm moved for a stay of the action and an order compelling arbitration pursuant to the agreement signed by Ginsburg and PaineWebber. The trial court denied this motion, and this timely appeal followed.[1]

In their sole assignment of error, PaineWebber and Wilhelm assert that the trial court erred in denying their motion for a

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[1] Pursuant to R.C. 2711.02(C), an order that denies a stay of the trial of any action pending arbitration is a final order that may be appealed.

stay of the proceedings pending arbitration. We are unpersuaded.

An appellate court reviews the denial of a stay of proceedings pending arbitration under an abuse-of-discretion standard.[2] An abuse of discretion contemplates more than an error of law or judgment; it implies that the court's attitude was unreasonable, arbitrary or unconscionable.[3] The Ohio Supreme Court has adopted four rules, common to both state and federal courts, for reviewing a decision concerning a dispute's "arbitrability": (1) that "'arbitration is a matter of contract and a party cannot be required to so submit to arbitration any dispute which he has not agreed to so submit"; (2) that the question whether a particular claim is arbitrable is one of law for the court to decide; (3) that, when deciding whether the parties have agreed to submit a particular claim to arbitration, a court may not rule on the potential merits of the underlying claim; and (4) that, when a "contract contains an arbitration provision, there is a presumption of arbitrability in the sense that '[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'"[4]

Here, the parties' dispute centers on whether the claims alleging fraudulent concealment and unlawful conversion are arbitrable. We note that the trial court denied the stay pending

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[2] See *Harsco v. Crane Carrier Co.* (1997), 122 Ohio App. 3d 406, 410, 701 N.E.2d 1040, 1043.

[3] See *id.*

[4] *Council of Smaller Enterprises v. Gates, McDonald & Co.* (1998), 80 Ohio St. 3d 661, 665-666, 687 N.E.2d 1352, 1355, citing *AT & T Technologies, Inc. v. Communications Workers of Am.* (1986), 475 U.S. 643, 648-650, quoting *Steelworkers v. Am. Mfg. Co.* (1960), 363 U.S. 564; *Steelworkers v. Warrior & Gulf Navigation Co.* (1960), 363 U.S. 574; and *Steelworkers v. Enterprise Wheel & Car Corp.* (1960), 363 U.S. 593.

arbitration without opinion. But because there is no dispute as to whether a valid arbitration provision existed within the contract, we may presume that the trial court based its decision on the premise that the fraudulent-concealment and unlawful-conversion claims were not subject to the arbitration provision contained in the contract. As the arbitrability of a claim is a question of law for the trial court, we review the issue of the arbitrability of the specific claims *de novo*.[5]

It has been held that the resolution of the question "[w]hether a claim falls within the scope of an arbitration agreement turns on the factual allegations in the complaint rather than on the legal causes of action asserted."[6] Here, the facts underpinning the unlawful-conversion claim are the same facts offered to support the claim of fraudulent concealment. In the complaint, Cohen alleged that Wilhelm and PaineWebber had had direct notice of, and thus knowledge of, Zenni's conduct because of the obvious pattern of risky and questionable trades made by Zenni on behalf of Ginsburg, and because of the numerous accounts opened in Ginsburg's name when only one account would have sufficed. Cohen also alleged that PaineWebber and Wilhelm had encouraged Zenni to befriend elderly investors, and that Wilhelm and PaineWebber had chosen to disregard their knowledge of Zenni's conduct and had failed to notify their elderly investors, including Ginsburg, of the theft. These facts essentially alleged a form of theft, *i.e.*, that PaineWebber and Wilhelm had "aided and abetted" Zenni in stealing Ginsburg's money.

Although the arbitration provision is broad, stating that it covers "any and all controversies" pertaining to the brokerage

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[5] See *Marchese v. Shearson Hayden Stone, Inc.* (C.A.9, 1984), 734 F. 2d 414, 423.

[6] *Duryee v. Rogers* (Sept. 23, 1999), Franklin App. Nos. 98-AP-1255 and 98-AP-1256, unreported.

account, we cannot say, as a matter of law, that a claim alleging such tortious conduct as the "aiding and abetting" of a theft is subject to the arbitration provision here. An arbitration clause itself is a contract. A contract requires a "meeting of the minds" as to the terms contained within. At the time that the parties entered into the contract, there was no meeting of the minds that the arbitration provision would cover claims alleging tortious forms of theft. If the parties had contemplated, at the time that they entered into the arbitration agreement, that PaineWebber would possibly steal from Ginsburg, that would surely be against public policy. Matters more likely to have been contemplated by both parties would have involved questions of whether a particular transaction was authorized or whether there was any miscalculation in the sum of money contained in the account. Here, the claims filed by Cohen alleged that PaineWebber and Wilhelm had engaged in conduct beyond the scope of the brokerage agreement. Zenni, allegedly with the knowledge of PaineWebber and Wilhelm, had sent altered and false monthly account statements to Ginsburg. Accordingly, under the stated circumstances in this case, we hold that, as a matter of law, the claims of unlawful conversion and fraudulent concealment, were not subject to the arbitration provision.

As the claims alleged here, by the facts in the complaint, were not subject to the arbitration provision, the trial court did not abuse its discretion in denying the motion of PaineWebber and Wilhelm to stay the proceedings and to compel arbitration. The sole assignment of error is overruled, and we affirm the judgment of the court below.

Judgment affirmed.

DOAN, P.J., WINKLER and SHANNON, JJ.

RAYMOND E. SHANNON, retired, from the First Appellate District, sitting by assignment.

Please Note:

The court has placed of record its own entry in this case on the date of the release of this Decision.

[Entered 4/25/01]

IN THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

ALFRED M. COHEN, Executor of the Estate of Samuel Ginsburg Plaintiff, v. **PAINEWEBBER INCORPORATED, et al.** Defendants.	:	Case No. A0004567 Judge Robert Ruehlman

ORDER AND ENTRY DENYING DEFENDANTS' MOTION TO STAY PROCEEDINGS PENDING ARBITRATION

The Defendants' Motion to Stay Proceedings Pending Arbitration came on for a hearing before the Court on April 5, 2001. Based on the arguments of counsel and the briefs, the Court finds that the request to vacate the current schedule is moot in that the Court previously vacated the schedule by entry dated February 26, 2001. The Court further finds that the request to stay proceedings pending arbitration is not well taken.

IT IS ORDERED AND ADJUDGED that Defendants' Motion to Vacate the Current schedule is moot and that the Court will establish a new schedule including a trial date at the April 25, 2001 conference and that the Defendants' Motion to Stay Proceedings Pending Arbitration is denied.

/s/ Robert Ruehlman
Judge Robert Ruehlman